# Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-24-474 OF 1998
KAMALANATHAN RATNAM J
7 JUNE 1999

***Civil Procedure*** *— Injunction — Interlocutory mandatory injunction to compel delivery — Non-disclosures of plaintiff — Whether omission deliberate — Whether injunction should be granted — Third and fourth defendants are shareholders — Failure to plead their interests to be protected*

The plaintiffs had brought this action by way of an originating summons ('the OS') alleging that the defendants have failed and/or refused to return, inter alia, all files, documents, accounts and vehicles belonging to the first and second plaintiffs based on the causes of action of conversion and detinue. On 31 March 1999, upon the defendants' application, the court set aside the ex parte mandatory injunction obtained by the plaintiffs on the grounds of non-disclosure of material facts and lack of clean hands and made certain other consequential orders. The plaintiffs now applied for an interlocutory mandatory injunction (encl 4) on the inter partes basis.

The plaintiffs at the ex parte stage sought to paint a picture of deceit and dishonesty on the part of the defendants in relation to the entering of the supplemental agreement to the Turnkey Contract dated 5 January 1998 between the first plaintiff and one Meda Property Services Sdn Bhd ('MPS'). At the time the Turnkey Contract dated 15 May 1995 was entered into by the first plaintiff with MPS, the third and fourth plaintiffs together with the three defendants were all shareholders and directors of both companies and as such had full knowledge of it. The plaintiffs implied that the defendants were enriching MPS at the expense of the first plaintiff. The plaintiffs also questioned the various sales of properties to MPS, Urban Vantage Sdn Bhd and Meda System Built Sdn Bhd ('MSB'). The plaintiffs also contended that the defendants caused the second plaintiff to break off its contract with Woh Heng Sdn Bhd in respect of the second plaintiff's project in Johor. The court was also asked to determine whether the third and fourth plaintiffs should have an interlocutory mandatory injunction in the terms prayed for in encl 4, pending trial.

**Held**, dismissing the application:

(1) The third and fourth plaintiffs cannot show that they have an 'unusually strong and clear' case nor can they show 'that it would be just and equitable that (their) interest be protected by the immediate issue of an injunction' simply because they have not pleaded and/or asked for any of their interests to be protected in encl 4. All the prayers in the OS relate to and concern property

belonging to the first and second plaintiffs, it can hardly be said that 'irreparable injury and inconvenience would result' to the third and fourth plaintiffs if an injunction is not granted to them. The third and fourth plaintiffs' application is dismissed with costs (see p 347F–H); *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 followed.

(2) Where a plaintiff now seeks interlocutory injunctive relief on an inter partes basis, the court may in exercising its jurisdiction, take into account how innocent or culpable the non-disclosures of the plaintiff were at the time of obtaining ex parte relief in deciding whether or not to grant the inter partes injunction. Such omissions must be deliberate (see pp 347I–348A, 348C).

(3) The plaintiffs were guilty of deliberate and wilful concealment of material facts regarding the Turnkey Contract and the supplemental agreement (see p 349G). In respect of the various sales of properties to MPS, Urban Vantage Sdn Bhd and MSB, the plaintiffs however had omitted to state the fact that these sales went towards settlement of monies owing by the first plaintiff to MPS (see pp 349I, 350B). In respect of the sale of Meda Calvenia Sdn Bhd ('Calvenia'), the Meda Group purchased the shares of Calvenia in order to make it part of the Meda Group. It is clear that this transaction was within the knowledge of the plaintiffs (see p 350C–E). On the allegation that the defendants caused the second plaintiff to break off its contract with Woh Heng Sdn Bhd in respect of the second plaintiff's project in Johor, the plaintiffs failed to disclose that the second plaintiff's obligation to appoint Woh Heng Sdn Bhd as the main contractor subsisted only while Woh Heng Sdn Bhd stood as a guarantor for the second plaintiff's bridging finance facilities (see p 350F–G).

(4) Having considered all these material non-disclosures, there was culpable intent on the part of the plaintiffs. It is an abuse of the process of the court. This alone is sufficient to deny the plaintiffs their call for this inter partes application for an interlocutory mandatory injunction (see p 350H–I).

**[Bahasa Malaysia summary**

Plaintif-plaintif telah memulakan tindakan melalui saman pemula ('SP tersebut') mendakwa bahawa defendan-defendan telah gagal dan/atau enggan memulangkan, antara lain, semua fail, dokumen, akaun dan kenderaan milik plaintif-plaintif pertama dan kedua berdasarkan kausa-kausa tindakan ke atas konversi dan detinu. Pada 31 Mac 1999, di atas permohonan defendan-defendan, mahkamah telah mengenepikan injunksi ex parte mandatori yang diperolehi oleh plaintif-plaintif atas alasan ketakdedahan fakta material dan kekurangan pengaruh yang bersih dan telah membuat perintah-perintah penting tertentu yang lain. Plaintif-plaintif sekarang

memohon suatu injunksi interlokutori mandatori atas dasar antara pihak. A

Plaintif-plaintif pada peringkat ex parte telah cuba untuk melukis suatu gambaran yang memperdayakan dan tidak jujur di pihak defendan-defendan berkaitan dengan kemasukan perjanjian tambahan kepada Kontrak Utama bertarikh 5 Januari 1998 antara plaintif pertama dan satu Meda Property Services Sdn Bhd ('MPS'). Pada masa Kontrak Utama bertarikh 15 Mei 1995 dimasuki oleh plaintif pertama dengan MPS, plaintif-plaintif ketiga dan keempat sama-sama dengan ketiga-tiga defendan semua merupakan pemegang saham dan pengarah kedua-dua syarikat tersebut dan oleh demikian mempunyai pengetahuan mengenainya. Plaintif-plaintif secara tersirat menyatakan bahawa defendan- defendan memperkayakan MPS di atas perbelanjaan plaintif pertama. Plaintif-plaintif juga mempersoalkan beberapa penjualan harta kepada MPS, Urban Vantage Sdn Bhd dan Meda System Built Sdn Bhd ('MSB'). Plaintif-plaintif juga menegaskan bahawa defendan- defendan telah menyebabkan plaintif kedua memberhentikan kontraknya dengan Woh Heng Sdn Bhd dari berhubung dengan projek plaintif kedua di Johor. Mahkamah juga meminta untuk menentukan sama ada plaintif-plaintif ketiga dan keempat mesti memperoleh injunksi interlokutori mandatori sebagai mana dipohon di dalam lamp 4, sementara menunggu perbicaraan. B C D E

**Diputuskan,** menolak permohonan tersebut:

(1) Plaintif-plaintif ketiga dan keempat tidak dapat menunjukkan bahawa mereka mempunyai kes 'luar biasa yang kuat dan jelas' mahupun boleh menunjukkan 'bahawa adalah adil dan ekuiti kepentingan (mereka) dilindungi oleh pengeluaran segera suatu injunksi kerana sememangnya mereka tidak merayu dan/atau menanyakan mana-mana kepentingan-kepentingan mereka dilindingi di dalam lamp 4. Semua permohonan di dalam SP tersebut adalah berkaitan dengan dan melibatkan harta kepunyaan plaintif-plaintif pertama dan kedua, dan adalah sukar untuk menyatakan bahawa 'kerugian yang tidak boleh diperbaiki dan menyulitkan akan mengakibatkan' kepada plaintif-plaintif ketiga dan keempat jika satu injunksi tidak diberikan kepada mereka. Permohonan plaintif-plaintif ketiga dan keempat dibuang dengan kos (lihat ms 347F–H); *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 diikut. F G H

(2) Di mana plaintif sekarang meminta suatu relief injunksi interlokutori atas dasar antara pihak, mahkamah boleh melaksanakan bidang kuasanya, dengan mengambil kira bagaimana tidak bersalah atau bersalah ketidakdedahan plaintif pada masa ia memperolehi relief ex parte di dalam memutuskan sama ada atau tidak memberi injunksi antara pihak. Peninggalan sebegini mestilah disengajakan (lihat ms 347I–348A, 348C). I

(3) Plaintif-plaintif bersalah terhadap penyembunyian secara sengaja dan disengajakan fakta-fakta material berhubung dengan Kontrak Utama dan perjanjian tambahan tersebut (lihat ms 349G). Berhubung dengan perbagai jualan harta kepada MPS, Urban Vantage Sdn Bhd dan MSB, plaintif-plaintif bagaimanapun telah tertinggal untuk menyatakan fakta bahawa jualan-jualan ini ditujukan untuk penyelesaian wang yang tertunggak oleh plaintif pertama kepada MPS (lihat ms 349I, 350B). Berhubung dengan jualan Meda Calvenia Sdn Bhd ('Calvenia'), Meda Group telah membeli saham-saham Calvenia bagi membolehkan ia menjadi sebahagian daripada Meda Group. Adalah jelas bahawa tansaksi ini di dalam pengetahuan plaintif-plaintif (lihat ms 350C–E). Terhadap dakwaan bahawa defendan-defendan telah menyebabkan plaintif kedua memberhentikan kontraknya dengan Woh Heng Sdn Bhd berhubung dengan projek plaintif kedua di Johor, plaintif-plaintif telah gagal untuk mendedahkan bahawa tanggungjawab plaintif kedua untuk melantik Woh Heng Sdn Bhd sebagai kontraktor utama wujud hanya semasa Woh Heng Sdn Bhd bertindak sebagai penjamin kepada kemudahan kewangan bersepadu plaintif kedua (lihat ms 350F–G).

(4) Setelah mengambil kira semua ketidakdedahan material ini, wujud niat bersalah di pihak plaintif-plaintif. Ini merupakan suatu penyalahgunaan proses mahkamah. Ini dengan sendirinya mencukupi untuk menidakkan kepada plaintif-plaintif permohonannya untuk suatu injuksi interlokutori mandatori secara inter alia (lihat ms 350H–I).]

**Notes**

For cases on interlocutory mandatory injuction see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2223–2227.

**Cases referred to**

*Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (refd)

*Foss v Harbottle* (1843) 67 ER 189 (refd)

*Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 (folld)

**Legislation referred to**

Companies Act 1965 s 16(5)

*Wong Kian Kheong* (*Andrew Chiew* with him) (*Lee Hishammuddin*) for the plaintiffs.

*Conrad Young* (*Azman Davidson & Co*) for the defendants.

*Cur Adv Vult*

**Kamalanathan Ratnam J:**

FACTS

The plaintiffs have brought this action by way of an originating summons ('OS') (encl 1) alleging that the defendants have failed and/or refused to return, inter alia, all files, documents, accounts and vehicles belonging to the first and second plaintiffs based on the causes of action of conversion and detinue and praying for delivery-up of the same and for damages to be assessed on account of the alleged failure and/or refusal to deliver-up.

On 15 June 1998, the plaintiffs by way of this application (encl 4) obtained an interlocutory mandatory injunction on an ex parte basis which had essentially given them the full reliefs they seek in so far as delivery-up was concerned.

On 31 March 1999, upon the defendants' application (encl 25), I set aside the ex parte mandatory injunction obtained by the plaintiffs (encl 15) on the grounds of non-disclosure of material facts and lack of clean hands and made certain other consequential orders. I do not intend to repeat the facts leading to this case as I have already done so in my written judgment given on 31 March 1999.

THE APPLICATION

This is the plaintiffs' application for an interlocutory mandatory injunction (encl 4) on the inter partes basis. A holding over the injunction has since been granted pending the disposal of this application.

FINDINGS OF THE COURT

*The third and fourth plaintiffs' claim to injunction*

It is apparent from reading the plaintiffs' OS (encl 1) that this action for the recovery of property allegedly belonging to the first and second plaintiffs is predicated upon the causes of action of conversion and detinue. This case does not concern any alleged breaches of any of the master agreement entered into between the third and fourth plaintiffs and the three defendants. This is also not a case for the return of property belonging to the third and fourth plaintiffs. In the circumstances I find that there is no reason whatsoever for the third and fourth plaintiffs to seek an interlocutory mandatory injunction by way of this application as they have not pleaded nor sought any relief in respect of any wrong done to them or in respect of any property belonging to them, either in the OS (encl 1) or in this application (encl 4). It is trite law that companies or corporations (the first and second plaintiffs) are the proper parties to sue for the recovery of property belonging to them (see the rule in *Foss v Harbottle* (1843) 67 ER 189; s 16(5) of the Companies Act 1965 and *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 at p 426 (CA)).

Of course there are exceptions to this principle of a separate legal personality of a company or a corporation and the principles and exceptions

to the rule in *Foss v Harbottle* have been well stated by the Court of Appeal in the *Krubong* case. As a result thereof a type of action called a derivate action arose. This is where the minority is allowed to bring an action on behalf of the wronged company which company is otherwise disabled from bringing the action itself by virtue of the wrongdoers being in control of the company. The key circumstance is where the company itself is unable to bring the action due to the wrongdoers being in control of it.

In the case before me the first and second plaintiffs are not disabled in any way from bringing the action to recover what is allegedly their property, hence the exceptions to the rule in *Foss v Harbottle* cannot apply.

I am fully aware that I had previously dismissed encl 26 on 10 December 1998, which was the defendants' application to, inter alia, strike out the third and fourth plaintiffs' action on the basis that they had no sustainable cause of action. I must however emphasise that the effect of that decision was merely that the third and fourth plaintiffs' action as a whole was not a plain and obvious one to be struck out summarily and that it merited full investigation at trial.

In this application I am being asked to determine whether the third and fourth plaintiffs should have an interlocutory mandatory injunction in the terms prayed for in encl 4, pending trial.

In the then Supreme Court decision of *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 (SC), Syed Agil Barakbah SCJ said at p 194:

> ... The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result.

It is obvious that to succeed in this application the third and fourth plaintiffs would have to satisfy me on the above dicta. It is therefore my finding that the third and fourth plaintiffs cannot show that they have an 'unusually strong and clear' case nor can they show 'that it would be just and equitable that (their) interest be protected by the immediate issue of an injunction' simply because they have not pleaded and/or asked for any of their interests to be protected in encl 4. I further find that since all the prayers in the OS relate to and concern property belonging to the first and second plaintiffs, it can hardly be said that 'irreparable injury and inconvenience would result' to the third and fourth plaintiffs if an injunction is not granted to them. I would therefore dismiss the third and fourth plaintiffs' application with costs.

*The first and second plaintiffs' claim*

The plaintiffs' ex parte injunction that they obtained (encl 15) was set aside by me on 31 March 1999, inter alia, on the grounds of material non-disclosure.

It is an established principle of law that in such a situation where a plaintiff now seeks interlocutory injunctive relief on an inter partes basis, the

court may in exercising its jurisdiction, take into account how innocent or culpable the non-disclosures of the plaintiff were at the time of obtaining ex parte relief in deciding whether or not to grant the inter partes injunction. In fact in my written judgment delivered on 31 March 1999, this is what I said on this at p 9 of the said judgment:

> ... The discretion to continue the ex parte injunction only arises because there is a discretion to grant a fresh one. In the circumstances, when the need to exercise this discretion arises it will be governed by whether the non-disclosure was innocent and whether the injunction would have been granted if the non-disclosed facts had indeed been disclosed.

Whilst it was plain and obvious to me that in obtaining the ex parte injunction the plaintiffs were guilty of numerous non-disclosures of very material facts which were well within their knowledge and which had to be disclosed I now have to consider whether such omissions were deliberate or innocent.

*The material non-disclosures*

(a) The Turnkey Contract

There is no dispute that at the time the Turnkey Contract dated 15 May 1995 was entered into by the first plaintiff with one Meda Property Services Sdn Bhd ('MPS'), the third and fourth plaintiffs together with the three defendants were all shareholders and directors of both companies and as such had full knowledge of it. The plaintiffs at ex parte stage sought to paint a picture of deceit and dishonesty on the part of the defendants in relation to the entering of the supplemental agreement dated 5 January 1998 between the first plaintiff and MPS. The supplemental agreement essentially records the agreement reached in respect of variations to the works done by MPS for the first plaintiff whereby it was also agreed that in consideration thereof an additional sum of RM61,560,740 was payable to MPS. The picture painted was to the effect that this was not in the ordinary course of business and implying that the defendants were enriching MPS at the expense of the first plaintiff. The plaintiffs further allege that in view of this so-called deceit and dishonesty, there is every risk that the defendants may wish to cover their tracks by destroying the documents.

What the plaintiffs failed to disclose were facts very material to their application and fully within their knowledge. These were:

(i) The fact that by the terms of the Turnkey Contract, MPS was to implement and carry out the first plaintiff's only project and this included everything from obtaining the necessary approvals, procuring bridging and end financing, coordination of sales to end-purchases, sales management and administration, billings and collection of payments from purchasers, etc. In other words, the first plaintiff had nothing to do with the project since MPS undertook the entirety of the first plaintiff's only project. Consequently the first plaintiff had no staff in its employ.

(ii) The fact that by these terms and by these circumstances, so long as the Turnkey Contract subsisted, MPS had every right to be in possession and custody of all the operational documents relating to the first plaintiff's project in order to carry out their obligations.

(iii) The fact that at the time this action was instituted on 3 June 1998 (encl 1) and at the time the ex parte summons in chambers (encl 4) was filed on 4 June 1998 the first plaintiff had not yet terminated MPS as Turnkey contractor. The purported termination came only on 12 June 1998.

(iv) The facts surrounding, necessitating and giving rise to the supplemental agreement.

(b) The supplemental agreement

The supplemental agreement was necessary because of delays caused by late approval by the authorities, changes in design and layout, changes from hostel units to high cost units eventually, changes to specifications and design of the terrace factories. These matters all had time and cost implications which resulted in a significant increase in costs.

The documents evidencing delay were all in existence at the time the third and fourth plaintiffs were part of the Meda Group and thus fully within their knowledge. In particular, the plaintiffs complain of the fact that the supplemental agreement involved an extension of time for completion of the works. Yet these extensions were already agreed to by 8 October 1996, well before the third and fourth plaintiffs left the Meda Group. The same extended completion dates were reduced into cl 5 of the supplemental agreement. As for the design and layout changes, again these matters arose well before the third plaintiff left the Meda Group. The same applies for all the other changes.

A further omission by the plaintiffs relates to their non-disclosure of the fact that given the design, specification and layout changes, which led to increased costs, specifically to upgrade to medium to high cost apartments and bigger factories, the profits receivable from this would also correspondingly increase. This is most relevant and important for it shows the business logic of such decisions and to my mind destroys the argument of deceit and dishonesty.

In the premise, it is abundantly clear that the plaintiffs were guilty of deliberate and wilful concealment of material facts regarding the Turnkey Contract and the supplemental agreement. This being so, it is my finding that they are clearly guilty of deliberate omission.

(c) Sale transactions to other companies

Since I was satisfied with non-disclosures (a) and (b) I did not at the setting aside of the ex parte injunction see the need to consider these other issues which were raised. I shall consider them now.

The plaintiffs question the various sales of properties to MPS, Urban Vantage Sdn Bhd and Meda System Built Sdn Bhd (MSB). They then

question the supplemental agreement dated 18 April 1998 entered into between the first plaintiff and MPS. Again they seek to paint a picture of deceit and dishonesty. A

The complaint of the plaintiffs is that no monies have been received in respect of the sale of properties to MPS, Urban Vantage and MSB, drawing the inference of the defendants siphoning away assets of the first plaintiff. B

The plaintiffs however omit to state the fact that these sales went towards settlement of monies owing by the first plaintiff to MPS. There can be no dispute that work was done and MPS was entitled to payment. The settlement agreement formalised these matters by giving effect to the sale ratified by those resolutions passed earlier. As for the sales of other companies, the plaintiffs raise questions on the sales to the various companies, once again attempting to paint a picture of deceit and dishonesty on the part of the defendants. C

In respect of the sale of Meda Calvenia Sdn Bhd (Calvenia), the Meda Group purchased the shares of Calvenia in order to make it part of the Meda Group. It was a condition of the purchase of these shares from the vendor that Calvenia would be listed and that it would have its own separate premises. Being unable to fulfil the second undertaking the Meda Group provided two detached factories to Calvenia. A shareholders agreement evidencing all this was exhibited. It is clear that this agreement even preceded the master agreement. Therefore it is equally clear that this transaction was also within the knowledge of the plaintiffs. In fact the third and fourth plaintiffs had even signed a memo dated 9 August 1996 evidencing this agreement which was well before they left the Meda Group. I am therefore left with the irresistible conclusion that the plaintiffs intentionally did not disclose this in order to strengthen their case for an ex parte injunction by painting a bleak picture of the transaction and also of the defendants. D E F

Woh Heng Sdn Bhd

During the ex parte stage the plaintiffs contended that the defendants caused the second plaintiff to break off its contract with Woh Heng Sdn Bhd in respect of the second plaintiff's project in Johor. However, the plaintiffs failed to disclose that the second plaintiff's obligation to appoint Woh Heng Sdn Bhd as the main contractor subsisted only while Woh Heng Sdn Bhd stood as a guarantor for the second plaintiff's bridging finance facilities. The plaintiffs failed to disclose that Woh Heng Sdn Bhd was released from the guarantee sometime in February 1997 and hence there was therefore no longer any obligation to keep them as the main contractor. G H

Having considered all these material non-disclosures, I cannot but find culpable intent on the part of the plaintiffs. Time and time again courts have voiced their strongest disapproval of such blatant inequitable conduct. To my mind such conduct is nothing more than an abuse of the process of the court. This alone in my view, is sufficient to deny the plaintiffs their call for this inter partes application for an interlocutory mandatory injunction. I

I do not therefore intend to consider the other issues based on facts as raised by both parties.

This application (encl 4) stands dismissed with costs. I shall set this case down for case management with a view to fixing an early date for its disposal.

*Application dismissed.*

Reported by Benjamin Yong